JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 977

ROBERT E. FUNKHOUSER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

ROBERT E. FUNKHOUSER,
Petitioner

Davidsonville, Maryland

July 18, 1962

King Bros. Inc., Printers, 208 N. Calvert St., Balto., Md. (7-16-62—50)

IN THE

Supreme Court of the United States

October Term, 1961

No. 977

ROBERT E. FUNKHOUSER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Comes now the petitioner and petitions the Court to grant a rehearing of the petition for a writ of certiorari filed in this Case on May 16, 1962 and denied by this Court on June 25, 1962.

FACTS

1. The record in this case shows, entirely by respondent's testimony and Court records, that this case was unjust and illegal from the beginning. Respondent admits that petitioner reported all gross income and all expenditures of that income in the income tax returns filed. Thus petitioner complied with all of the requirements of the Internal Revenue Law of 1939 (Sec. 41, 51, 54). The record shows the prosecution was unjust and illegal from that beginning.

The sentence was illegal. Justice requires that the illegal sentence be corrected.

2. The record shows that this case was begun by respondent on "assumed figures" set up by respondent's agent who testified that he had made no inquiry about the particular items or the specific checks listed on the returns, had made no inquiry about the mortgages or mortgage interest payable, had made no calculation of the listed items, had made no computation of the allowable depreciation, had made no tabulation of the listed items and had just set up several different sets of "assumed figures" in violation of Section 272 of the Internal Revenue Law and had then set up several different sets of "assumed figures" for the charges in this case.

3. The record shows that respondent took those "assumed figures" to the Department of Justice where they were examined and rejected for criminal prosecution and the case was returned to respondent for the examination required by law. (Sec. 54, 57, 271, 272).

4. The record shows that thereafter there was no examination of the books, records or returns and the agent just took the "assumed figures" to the United States Attorney in Baltimore, Maryland and confused the United States Attorney with the "assumed figures" and confused him about the identity of this petitioner and confused this petitioner with a Mr. Funkhouser from West Virginia; forged the name of the United States Attorney on a false paper charging some "assumed figures" as taxes, due, owing, payable and evaded.

5. The record shows that this petitioner, a resident of the District of Columbia was then arrested on the false,

forged, confused paper set up as an indictment and filed by respondent in the District Court in Baltimore.

6. The record shows that petitioner immediately employed a reputable Washington lawyer but the lawyer was confronted with a local court rule which required petitioner to be represented by a local Baltimore lawyer.

7. The record shows that petitioner was forced to hire local counsel and the record shows the local counsel forced on petitioner by the local court rule failed to properly defend petitioner from the beginning of the case to the end of the case. From the beginning the local counsel failed to question the false, confused, forged indictment or the "assumed figures" set up by respondent's agent as taxes due, owing and payable without his having made any inquiry, calculation, computation of the books, records or returns and set up in direct violation of Sections 51, 57, 271, 272 which required such examination and the determination of the amount of income subject to tax.

The record shows that the Judge told the jury that no examination or tabulation was at all necessary. The Judge told the jury that the agent could set up any "assumed figures" and contentions without any examination or tabulation and whatever he "assumed or contended" was tax due, owing and evaded and the Judge ruled that such assumptions and contentions were taxes due and could not be disproved by proof of an examination by a C. P. A. or accountant. The Judge told the jury: At the beginning of the case:

> By Judge Chesnut:
>
> Well, now, have you made any tabulation? I do not think that it is at all necessary, I am merely inquiring as to whether you have made any tabulation of what

his aggregate amounts are for that year, which appear on these books. (Tr. 5-21-52, page 27).

At the ending of the case:

By Judge Chesnut:

Well, he does it because he is an official of the United States authorized to determine what tax is correct according to the contention of the Government, but Mr. Golomb is not an official of the United States and he has no authority to tell this jury what the tax is and what the tax is not, but you can argue from your computation. (Tr., 6-3-52, page 1413).

That ruling by the lower court, and many similiar rulings were unjust and illegal. They were in violation of sections 54, 57, 271, 272 of the Internal Revenue Code and they brought about the illegal sentence in this case.

8. The record shows that the local counsel forced on petitioner for the trial of this case failed to object to the misstatement of the applicable law to the jury by the Judge when the Judge quoted the last 62 words of Section 145(b) as the law of the case.

By Judge Chesnut:

Now, coming to the particular charge in this case, the particular charge is an alleged violation of Section 145(b) of Title 26, United States Code which, in material part, reads as follows:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

That section of the law was not applicable in this case

when this taxpayer had reported all gross income and all expenses and had paid the tax due on his assessment of the tax. The respondent had not made any examination of the books, records or returns and had not determined or assessed any deficiency in tax as required by Sec. 54, 55, 271, 272. The record shows that respondent knew and told the Court that he knew the figures set up in the false, forged indictment were simply "assumed figures which could not be legally worked". Respondent told the Court:

> By Mr. Green:
>
> If Your Honor please, in 1944, 1946 and 1947 the figures shown on the Government's program as a corrected net income figure are slightly different from the figures stated in the indictment, and I was asking Mr. Hannum's tax computation on the basis of both the indictment figure and the figures appearing in our score sheet. (Tr., 5-27-52, pages 494-496).
>
> By Mr. Green:
>
> As a matter of fact it was never considered possible to work this case on a net worth basis. (Tr., 6-3-52, page 1350).
>
> By Judge Chesnut:
>
> Now, this case has to do with deductions from income. Now, this case differs from any other income tax case, alleged income tax evasion case, that we have tried in this court by reason of the fact that the Government does not dispute the amount of gross income. It does not dispute the right of the defendant to make deductions from his gross income. The question, is in the case as to whether the making of these deductions in the returns to the Government were made fradulently for the purpose of evasion. That is the only issue in the case. (Tr., 6-3-52, page 1357).

When petitioner had kept books and records and had

made and filed income tax returns in which he had reported all gross income and every expenditure of that income he had complied with all of the requirements of the law (Sec. 41, 51, 54) and it was then respondent's statutory duty (not the duty of this petitioner) to examine those books and records and determine which if any of the listed expenditures were deductible. Petitioner listed each item of expense claimed as a deduction and it was the duty of the Commissioner (not this petitioner) to make the legal determination of which items (if any) were allowable or were not allowable.

> Section 29.54: Every person subject to the tax, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1.

> Section 29.57 EXAMINATION OF RETURN AND DETERMINATION OF TAX BY COMMISSIONER. As soon as practicable after returns are filed, they will be examined and the correct amount of the tax determined under such proceedure as may be prescribed from time to time by the Commissioner. (See Section 272).

The record in this case shows that petitioner had complied with all of the requirements of the law when he reported all gross income and all expenses so that they could be examined by respondent and could be pointed out ONE BY ONE. Respondent told the jury:

> By Mr. Green:
>
> We have, members of the jury, at great length specified to you *one by one* the various expenses which Mr.

Funkhouser on his books and records, and in his income tax returns, said were incurred in connection with his business. 3 Tr., 6-4-52, page 5).

The record shows that when petitioner had reported all gross income and all expenses "ONE BY ONE" he had complied with all of the requirements of the law and it was then the statutory duty of respondent to examine those returns and determine the correct amount of the tax under such proceedures as may be prescribed from time to time by the Commissioner. It was the duty of the Commissioner and not this petitioner to determine the correct amount of the tax.

This prosecution was unjust and illegal on those facts.

The record shows that the Commissioner did not examine the returns and did not determine the correct amount of the tax and did not determine any deficiency in tax. The record shows that the agent testified that he did not make any inquiry about the particular items (App. 28), made no inquiry about the mortgages or interest payable (App. 35-36), made no inquiry about the specific checks (App. 46), made on calculation of the listed items (App. 27), made no computation of the allowable depreciation (App. 48), made no tabulation of the listed items (App. 27), determined no deficiency in tax (E. 27) mailed no notice of deficiency (E. 27), made no assessment of any deficiency in tax (E. 28).

The record shows that on those facts, *shown in the record by respondent's testimony*, there was no deficiency in taxes determined, due, owing, payable or evaded as charged in the phony, false, forged paper on which this case was prosecented as an indictment.

The record shows that with that beginning respondent had petitioner arrested in Washington, D. C., and hauled

before the United States District Court in Baltimore where his lawyer was not permitted to represent him because the lawyer did not maintain a law office in Baltimore. The record shows that the local Baltimore lawyers forced on petitioner for the trial of this case did not cite a single section of the applicable law or a single case and that respondent cited cases which were not applicable to the facts in this case such as:

CUMMERFORD v. U. S., 64 F. 2d 28, 30,
FORD v. U. S., 233 F. 2d 56,
GUZIK v. U. S., 54 F. 2d 618.

Respondent cited those cases as authority for the criminal prosecution in this case but respondent ignored the fact that in each of those cases the taxpayer had failed to report correct gross income. There [redacted] was no such failure on the part of this taxpayer to report correct gross income or expenses as every dollar received and every dollar expended was "specified ONE BY ONE" and respondent failed to examine those returns, determine the correct amount of taxable income, determine the correct amount of the tax, determine, assess or impose any deficiency or afford petitioner any opportunity to petition the Board of Tax Appeals for a review or redetermination of any proposed deficiency. This prosecution was unjust, illegal and vicious from the beginning.

The record shows that respondent's agent just went to Baltimore, set up several different sets of "assumed figures", falsely set out that the "assumed figures" were taxes, due, owing and evaded; confused the United States Attorney as to the identity of this petitioner and confused this petitioner with a Mr. Funkhouser from West Virginia

and forged the name of Bernard J. Flynn on the phony, false, forged paper for the indictment in this case.

9. The record shows that the local Baltimore lawyer forced on petitioner by the local court rule failed to properly defend petitioner in the trial and before the case was completed the local counsel confronted petitioner with demands for a fee for an appeal of the case and before the jury had considered the case and while the jury was still out considering the case, and before the verdict of the jury was returned the local counsel decided that if a fee for an appeal was not paid to him before the verdict of the jury and before the case was concluded that he would immediately ask the Judge to immediately impose the sentence and would have petitioner fingerprinted and would secure and file in the court a paper agreeing that petitioner would immediately start serving the sentence.

10. The record shows that the local counsel had petitioner fingerprinted and had a paper signed agreeing to the immediate beginning of the sentence but the local counsel did not record that paper and he withheld it from the Court records while he and his law partners discussed and determined the minimum amount they would accept for their appeal. The record shows that the law firm of Anderson, Barnes and Coe discussed the fees from June 6, 1952 until June 19, 1952 when they quoted a minimum fee of seven or eight thousand dollars for an appeal which they would prosecute on the Notice of Appeal filed by petitioner on June 6, 1952. They knew that petitioner had protected the right to appeal by the letter of June 6, 1952 to Judge Chesnut and they knew that there was no hurry in their discussions and in arriving at the amount of the fee as they would avail themselves of the Notice of Appeal filed by petitioner on June 6, 1952.

11. The record shows that on the same day the sentence was imposed, June 6, 1952, this petitioner wrote THREE letters to Judge Chesnut, the District Judge who tried the case and who had imposed the sentence in each or which he complianed to the judge of the different "assumed figures" set up by respondent and the imposition and deceit for the false, forged, confused indictment and sentence. And then on that same day, June 6, 1952, the record shows petitioner wrote a FOURTH letter to the local counsel asking counsel to quote their price for pursuing the appeal.

12. The record shows that all FOUR of petitioner's letters of June 6, 1952 were received and read, THREE of them by Judge Chesnut and the FOURTH by the local counsel but the record shows that all FOUR of those letters were kept out of the District Court records by returning, withholding or rejecting them and the record shows that in addition to those FOUR letters written on June 6, 1952 that petitioner wrote a FIFTH letter on June 28, 1952 to Judge Chesnut complaining about the illegal sentence which FIFTH letter was filed in the District Court by Mr. Serrell and was promptly removed from the District Court records and was mailed to petitioner in Petersburg Virginia Reformatory by Judge Chesnut.

ALL FIVE OF THE LETTERS written in June 1952 complaining of the illegal sentence were removed from the District Court records to frustrate any appeal of the illlegal sentence.

The FIRST letter of June 6, 1952 was received, read, it was noted that it concerned an appeal, and it was mailed to petitioner's wife in Washington, D. C., with a suggestion that it be turned over to local counsel.

The SECOND letter of June 6, 1952 was received, read and stached away in Judge Chesnut's private file until August 1960 when it was presented as the only letter written on June 6, 1952.

The THIRD letter of June 6, 1952 was received, read and stached away in Judge Chesnut's private file until September 11, 1961 when it was disgorged.

The FOURTH letter of June 6, 1952 was received, read, discussed and a fee of seven or eight thousand dollars was quoted for the appeal noted in the FIRST letter of June 6, 1952.

The FIFTH letter of June 28, 1952 was filed in the District Court by Mr. Sorrell and it was read, commented on and removed from the Court records and mailed by Judge Chesnut to petitioner in Petersburg Reformatory in Petersburg, Virginia with advice to make other use of it.

13. The record shows that with those letters removed from the District Court records, the Transcripts of Proceedings showing that the letter of appeal had been received and showing that respondent had testified that there had been no inquiry, calculation, tabulation or examination of the books, records or returns and that no tax was due, owing, payable or evaded as charged promptly disappeared from the District Court files.

14. The record shows that it took petitioner eight years to get proof in the record that the FIRST letter of June 6, 1952 had been received, read and not filed in the District Court records. The Transcript of Proceedings of 9-10-52 was not returned to the Court records until December 18, 1959 and the Transcript of Proceedings of 5-20-52 was returned to the records on 9-11-61 to make the record show

that all FIVE letters of June 1952 had been received and they showed that from the very day the sentence was imposed petitioner had vigorously complained about the sentence and had done all within his power to appeal the case.

The Transcript of September 10, 1952 proceedings showed the receipt and acknowledgment in open court that the FIRST letter of June 6, 1952 addressed to Judge Chesnut expressed petitioner's idea of appealing.

> By Judge Chesnut:
>
> Now, I recall receiving a letter from Mr. Funkhouser during that period, shortly after, and before present counsel came into the case, which was generally to the effect that he had no idea of appealing. (Tr., 9-10-52, page 11).

That was the first proof in the record that any of the FOUR letters written by petitioner had been received, their contents noted and that they were being withheld from the record. The next proof that the SECOND letter had been received and had been withheld from the record came into the record in August 1960 when respondent presented to the Court of Appeals as Government Exhibit "A" attached to the SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES the SECOND letter written by petitioner on June 6, 1952. It was produced by respondent and represented to be the only letter written by petitioner on June 6, 1952 to confuse the Court of Appeals.

The THIRD letter written by petitioner to Judge Chesnut on June 6, 1952 was put into the District Court record by respondent on September 11, 1961 when it was produced

from Judge Chesnut's personal files by Mrs. Ried where it had been kept from June 6, 1952 until September 11, 1961.

Proof that the FOURTH letter written by petitioner on June 6, 1952 had been received was put into the record of the case on September 11, 1961 when G. C. A. Anderson testifying as a Court witnes testified that he had a letter which acknowledged receipt of the FOURTH letter of June 6, 1952 regarding the appeal of the case. (E. 72).

The record shows that the Clerk of the District Court refused to file that letter on direction of Judge Thomsen who had made findings of fact and conclusions of law that petitioner had made no attempt to appeal this case:

JUDGE THOMSEN SAID:

> Judge Chesnut denies receiving the disputed letter. Mrs. Ried testified that she did not recall receiving or seeing any such letter, although she always opened the Judge's mail. She further testified that it was Judge Chesnut's regular practice to transmit any such letter to the Clerk, with a covering letter or memorandum, and to reply to the writer. Judge Chesnut's fairness is proverbial; his scrupulousness in handling his correspondence with prisoners is an example to all judges. It is incredible that he would have failed to transmit such a letter to the Clerk. (E. 79).

The records shows those findings of fact are contrary to the record in this case. The record shows that Judge Chesnut stated his policy at that time to be:

BY JUDGE CHESNUT:

> I receive many such application within sixty days of the imposition of the sentence and I take the trouble to read most of them, but this last one, well, I think it was received possibly a day or so before or after the sixty days, but it was not presented to me by counsel, and of

course, you would not reasonably expect me to take the initiative in it, to communicate with counsel to discuss the matter. (Tr., 9-10-52, pages 17-18).

That record shows that Judge Chesnut's regular practice at that time as stated by Judge Chesnut at that time was to "not take the trouble to read some of the letters he received after the imposition of the sentence, but this last one (a letter from this petitioner) he was confused as to when it was received and it was not presented by counsel, and of course, you would not reasonably expect me to take the initiative in it, to communicate with counsel to discus the matter."

That statement of policy by Judge Chesnut clearly sets out the practice which he followed in his post conviction cases at that time and it completely disapproves the findings of fact set out by Judge Thomsen as quoted above.

And the record shows that Judge Chesnut does not testify that he did not receive the FIRST letter written by petitioner on June 6, 1952. The FIRST and only letter of June 6, 1952 which mentioned petitioner's idea of appealing the case which Judge Chesnut referred to in open court on September 10, 1952. He says he did not read all of the letters received and "to the best of my recollection I did not receive it".

When Judge Chesnut was placed on the witness stand on September 11, 1961 as a Court witness he was questioned by Judge Thomsen about the penciled written letter written by petitioner in the Baltimore Jail on June 6, 1952 immediately after the sentence was imposed as follows:

Question by Judge Thomsen:

I think a statement from Judge Chesnut should be

in the record as to whether or not he received that pencilled-written letter to which reference has been made.

ANSWER BY JUDGE CHESNUT:

To the best of my recollection and belief I did not receive the questioned letter of June 6th from Mr. Funkhouser either then or at any time thereafter and knew not the contents or purported contents thereof until I had read in the second appeal of Mr. Funkhouser to the Court of Appeals in his case his statement by I think—I'm not sure whether it was a per curiam statement, but I think it was Judge Sobeloff speaking for the Court, that Mr. Funkhouser had said that he had written me this questioned letter and that the United States Attorney, Mr. Pearson, had produced a letter of June 6th of different import, which I had received, and upon reading in the opinion of the Court of Appeals that Mr. Funkhouser had filed what purported to be a copy of the questioned letter of June 6th, I sent down to the United States Attorney's office and was furnished a purported photostat of that letter. (E. 34-35).

The record shows that Judge Chesnut now admits he did receive TWO letters from petitioner written on June 6, 1952 which he did not transmit to the Clerk and did not acknowledge in any reply to the writer. The record shows he just kept those letters in his private file from June 1952 until August 1960 when he released one of them to the United States Attorney for presentation to the Court of Appeals as the only letter written by petitioner on June 6, 1952 (Government Exhibit "A"); while he retained the THIRD letter of June 6, 1952 (Government Exhibit M-1) in his private file until September 11, 1961 when it was disgorged and put into the record after repeated denials that it or any other letter had been written.

The record shows that the FOURTH letter written by petitioner on June 6, 1952—the day the sentence was imposed—was received by the local law partners of Judge Chesnut's son-in-law Wilson K. Barnes who was then living with Judge Chesnut at 111 Ridgewood Road in Baltimore and it was discussed by them and in reply to that FOURTH letter of June 6, 1952 they quoted to petitioner a minimum fee of seven or enght thousand dollars for an appeal which they would base on the Notice of Appeal in the FIRST letter to Judge Chesnut of June 6, 1952.

The discussions about the fee lasted from June 6, 1952 until June 19, 1952 and the fee of seven or eight thousand dollars quoted by Anderson and Barnes on June 19, 1952 proposed to proceed with the appeal on the Notice of Appeal filed by petitioner on June 6th in the FIRST letter to Judge Chesnut. (Mandamus Ex. "A").

The record shows that the injustice of respondent prosecuting a criminal tax case in a district foreign to the district in which taxpayer was residing has been called to the attention of Congress and it has been corrected by the Congress by 72 Stat. 512, approved August 6, 1958 and the local District Court rule by which the District Court required petitioner to employ local counsel has not been enforced since the injustice in this case has been exposed and it has been amended. (E. 81). Thus two of the errors and injustices complained of have already been recognized and corrected. The injustice done in this case however has not yet been corrected.

The injustice of the illegal prosecution on reckless "assumed figures" set up without any inquiry, examination, calculation, computation, tabulation, determination of the amount of income subject to tax, determination of the cor-

rect amount of the tax, determination of a deficiency in tax, notice of deficiency and opportunity for any review or redetermination of any proposed deficiency and the assessment of a deficiency and the prosecution on a phony, false, forged confused indictment set up in violation of Rules 6(c) and 7(c) of the federal Rules of Criminal Procedure have not yet been corrected, and they require correction. The injustice and illegality of the removal, rejection, withholding and return of District Court papers important to the appeal and correction of the illegal sentence requires attention and the practice of permitting counsel to force a defendant to decide before a case is concluded whether to pay counsel a fee for an appeal or to have the sentence imposed immediately and begin serving the sentence at once should be corrected. This petitioner was by law afforded a period of ten days after the imposition of the sentence in which to take an appeal in this case and he was denied due process of law when his Notice of Appeal and other papers were removed from the District Court records to frustrate any appeal.

ARGUMENT

In the brief filed in opposition to the petition respondent does not deny petitioner's allegations of injustice and illegality. Respondent only attempts to confuse the facts about the prosecution and the illegal sentence he secured on the "assumed figures" his agent set up in violation of Internal Revenue Law (Sec. 54, 57, 271, 272).

Respondent argues that petitioner cannot raise and question the illegal contentions, assumptions and proceedures used by respondent in the District Court to secure the illegal sentence. Respondent argues that when he had secured the sentence on the contentions and assumptions of his agent

without any inquiry, without any examination, without any calculation, without any computation, without any tabulation, without any determination of the correct amount of income subject to tax, without determination of the correct amount of the tax, without making the required computations to determine if there was a deficiency in tax, without any notice of deficiency, without any review or redetermination of the reckless contentions of the agent, without computation and assessment of any deficiency in tax.

The record shows, by respondent's testimony, that respondent's agents did not comply with any of the Statutory requirements of the Internal Revenue Law for the determination of any deficiency in tax and just set up the several different sets of "assumed figures" for the reckless assumed contentions in this case.

The records shows that without having made any inquiry, examination, determination, assessment of any tax, or the determination of the correct amount of income subject to tax neither respondent nor the jury in this case could determine that any tax was due, owing or evaded. Respondent never made any inquiry, calculation, examination or tabulation of the listed items of income or expense to determine the correct amount of income subject to tax and therefore neither respondent, the District Court or the jury had any facts or figures on which to base any computation or charge that any tax was due, owing or evaded.

The record shows that petitioner had two reputable Certified Public Accountants examine the books, records and returns and one of them, John Berg, convinced the Department of Justice that respondent's charges were "reckless assumptions" not based on any examination or facts and the Department of Justice promptly rejected the assump-

tions and returned the papers to respondent for the examination required by law. (Sec. 54, 57, 271, 272).

The record shows that respondent thereafter made no examination and just took the same reckless "assumed figures" to Batlimore, Maryland and confused the United States Attorney in Baltimore as to the facts, and confused the United State Attorney as to the identity of the petitioner and confused this petitioner with another Mr. Funkhouser from West Virginia, (E. 47), then forged the name of the United States Attorney on a confused, false paper charging the evasion of taxes never inquired about, calculated, tabulated, computed, determined or assessed. The charges on that paper were nothing but assumptions of one of respondent's agent made in violation of Sec. 54, 57, 271, 272 but some one forged the name of the United States Attorney on the paper and presented it to the District Court for the indictment in this case.

The record shows that respondent now tries to justify those reckless asumptions of his agent for the prosecution of this case on the ruling of this Court in FORD v. UNITED STATES 352 U. S. 891 and CUMMERFORD v. UNITED STATES 289 U. S. 759 but in those cases the ruling of the Court was based on the fact that the taxpayers had not reported correct gross income in the returns filed and it was impossible for the Commissioner to compute the correct amount of the tax. The court held that where the taxpayer had falsely reported the amount of gross income received he could be criminally prosecuted without first determining the precise amount of the tax.

In this case the record shows that the correct amount of gross income was reported and every expenditure of that income was reported and specified "ONE BY ONE".

The Department of Justice had ascertained that fact and had returned the case to respondent for the statutory required examination but respondent thereafter made no examination.

The record shows that before this trial petitioner employed a reputable Baltimore accountant, Mr. Philip Golomb, who carefully examined books, records and returns and testified that there was a net loss of $16,113.57 and no tax was due. (App. 52).

The record shows that the testimony of the accountant, Philip Golomb, who had examined the books, record and returns was rejected by Judge Chesnut who ruled that the "assumed figures" of the agent who repeatedly testified that he had not made any examination and that he had not made any inquiry, calculation, computation or tabulation was "what the tax is".

> By Judge Chesnut:
>
> Well, he (the agent) does it because he is an official of the United States authorized to determine what tax is correct according to the contention of the Government, but Mr. Golomb is not an official of the United States and he has no authority to tell this jury what the tax is and what the tax is not. (Tr., 6-3-52, page 1413).

That ruling deprived this petitioner of due process of law because there is no provision of law permitting any agent to set up "assumed figures" and contentions made without any examination and such contentions are directly in violation of the provisions of Sections 54, 57, 271, 272 of the law and which provide the only legal method of determining "what the tax is and what the tax is not".

The provisions of Section 145(b) were not applicable in this case because no tax had been determined, and no tax was due, owing, payable or imposed by the Chapter.

CONCLUSION

The record shows respondent has been careless with the facts presented to this Court. Respondent told this Honorable Court that petitioner's petition was out of time. (page 4).

The record shows that on May 11, 1962 petitioner served two copies of the petition on the Solicitor General and delivered 40 copies of the petition to the Clerk of this Court. The Certified record from the Clerk of the Court of Appeals had not been received and petitioner prepared a petition for an order extending the time for filing to 9-28-62 to be signed by a Justice of this Court. The order was signed and filed. The petition was in time. Respondent was in error.

The record shows that respondent was also in error in his argument that petitioner's contentions are without merit.

2(a). Respondent concedes that no computation or assessment of any tax liability was made before petitioner was convicted of income tax evasion and respondent argues that none was necessary. That is error.

Respondent contends that the penalties of Section 145(b) of the Internal Revenue Code of 1939 are [redacted] applicable.

Petitioner contends there is no provision for the imposition of the penalties for assumptions, contentions, imaginations or charges or gusses of any agent or anyone else. The penalties provided in Section 145(b) apply only to

"the evasion and defeat of any tax imposed by this chapter or the payment thereof" (Sec. 145(b)).

There was absolutely no evidence of any imposition of any tax and from the beginning respondent testified that no inquiry, calculation, computation, tabulation, or examination had been made, no dtermination of any deficiency, no notice of deficiency and no assessment of any tax and no tax was due, owing or evaded.

Respondent repeatedly sited FORD v. U. S. 233 F. 2d 56-59 and CUMMERFORD v. U. S. 64 F. 2d 28, 30 in both of which cases the taxpayer had failed to report correct gross income and in each case the court had held that it was not necessary to make the precise computation and assessment of the tax before a criminal prosecution for failure to report correct gross income. In each of those cases and all similiar cases the court held that the crime was the failure to report correct income on which the correct tax could be computed.

In this case petitioner did report correct gross income and each and every expense claimed. The chapter required the Commissioner (not the petitioner) to examine those returns and to determine the correct amount of income subject to the tax (sec. 54) and examine those returns and determine the correct amount of the tax (Sec. 57). There is no provision for any agent to set up several sets of "assumed figures" without any inquiry, calculation, computation, tabulation or examination and proceed with a criminal prosecution on several different sets of reckless "assumed figures". The charge in the phony, forged indictment was untrue when it stated "he then and there well knew, their joint net income for the said calendar year was the sum of $14,467.57, upon which said net income there was

owing to the United States of America an income and victory tax of $4,294.09".

All income and all expenses had been reported and until respondent had examined the returns as required by law (Sec. 54, 57, 271, 272) neither petitioner nor respondent could know if any tax was due, owing or payable. This prosecution was illegally based on assumptions and "assumed figures" set up in violation of law. It was illegal from the filing of the false, forged, confused, phony indictment when there had been no examination of the books, records or returns and no determination of the correct amount of income subject to tax and no determination or assessment of any deficiency in tax. The record shows that all gross income and all expenses were reported "ONE BY ONE" so that the Commissioner could have examined the returns and could have determined the correct tax.

2(b). No crime was committed in any jurisdiction in the United States when petitioner kept the required books and records and made and filed income tax returns in which he reported all gross income and all expenses.

2(c). The indictment was not signed by any Assistant United States Attorney and there is no record of any Assistant United States Attorney presenting the case to a grand jury. The United States Attorney testified that he did not present the case to the grand jury, did not sign the indictment, and testified "The fact of the matter, and I think we were confused with another Mr. Funkhouser all along, and I was surprised to find out that you weren't the same man. I thought you were from West Virginia" (E. 47). There is no record of any grand jury proceedings as required by Section 6(c) or 7(c) of the Federal Rules of Criminal Procedure. The United States Attorney whose name was

forged on the indictment testified that he did not present it to any grand jury, and there are no District Court records of any grand jury proceedings. The record shows that the District Court ordered petitioner to cease submitting interrogatories to members of the grand jury which kept the facts off the record.

2(d). Rule 55 of the United States District Court for the District of Maryland provided that "no notice required to be signed by counsel shall be accepted by the clerk, unles it is signed by an attorney or solicitor who shall be a resident of and shall maintain an office in this district". That rule was questioned and Judge Chesnut appointed the law partner of his son-in-law to revise the rules and the rule was retained and enforced until the injustice of the rule became notorious and it was then amended. The Court told the Court of Appeals on October 18, 1961 "That rule has not been enforced in recent years in criminal cases and has been amended." (E. 81).

3(e). The record shows that petitioner wrote FOUR letters complaining about the unjust, illegal sentence and the imposition and deception by which it was secured on June 6, 1952. All FOUR of those letters were rejected, removed, returned or withheld from the District Court Records for over eight years when one of them was released by Judge Chesnut from his personal file to be presented by respondent as Government Exhibit "A" attached to the SECOND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES in August 1960 and represented that letter to be the only letter written by petitioner on June 6, 1952. It had been stached away in Judge Chesnut's personal file and kept off the District Court record from June 6, 1952 and it was presented in August 1960 as the only GENUINE letter and has been so designated and referred

to ever since although all FOUR of the letters written on June 6, 1952 have since been returned to the District Court files as Government Exhibits "A", "M-1", App. 55, and Petition for Mandamus "A". Those FOUR letters written on June 6, 1952 within a few hours after the sentence was imposed and petitioner's "Affidavit of Facts" written on June 28, 1952 which was filed in District Court by Mr. Sorrell and removed and mailed to petitioner in Petersburg by Judge Chesnut afford the best kind of proof and evidence that petitioner was dissatisfied with the injustice and illegality of the case and was repeatedly and forcefully calling the Court's attention to the deception, injustice and illegality of the prosecution and doing it as forcefully and clearly as possible under the circumstances.

The record shows injustice and illegality which this Honorable Court should examine and correct.

Petitioner prays this Honorable Court to grant a rehearing, give this petition more time and consideration than was possible in the time between Thursday, June 21, 1962 and Monday, June 25, 1962 when it was denied by this court with 204 other petitions. The record will show that this petition has merit. Please examine this record.

Petitioner hereby certifies that this petition is presented in good faith and not for delay and for the grounds above specified.

Respectfully,

ROBERT E. FUNKHOUSER,
Davidsonville, Maryland.

July 18, 1962